

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TIMOTHY MCKIMMY,

Plaintiff,

v.

OPENSEA,

Defendant.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 4:22-CV-00545

**DEFENDANT OPENSEA'S STATEMENT REGARDING ITS
MOTION TO COMPEL ARBITRATION**

Of Counsel:

Eric Ball (admitted *pro hac vice*)
Cal. Bar No. 241327
801 California Street
Mountain View, CA 94041
Tel.: (650) 988-8500
Fax: (650) 938-5200
eball@fenwick.com

/s/ Rodger R. Cole

Rodger R. Cole (admitted *pro hac vice*)
Cal. Bar No. 178865
801 California Street
Mountain View, CA 94041
Tel.: (650) 988-8500
Fax: (650) 938-5200
rcole@fenwick.com

Molly R. Melcher (admitted *pro hac vice*)
Cal. Bar No. 272950
555 California Street, 12th Floor
San Francisco, CA 94104
Tel.: (415) 875-2300
Fax: (415) 281-1350
mmelcher@fenwick.com

Attorney-in-Charge for Defendant OpenSea

Geoffrey R. Miller
Tex. Bar No. 24094847
S.D. Tex. Bar No. 3365078
FENWICK & WEST LLP
902 Broadway, Suite 14
New York, NY 10010
Tel.: (212) 430-2600
Fax: (650) 988-8500
gmiller@fenwick.com

In Defendant OpenSea's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint (Dkt. 17), OpenSea outlined three Terms of Service acceptance flows:

- (1) Acceptance of the Terms before a user's first NFT purchase ("Purchase Flow"),
- (2) Acceptance of the Terms before a user first uses OpenSea's mobile application ("App Flow"), and
- (3) Acceptance of the Terms via a pop-up authentication request that appears when a user takes certain actions on the OpenSea website and is prompted to connect their crypto wallet to OpenSea ("Wallet Authentication Flow").

In his Opposition, Plaintiff did not address, and thus did not dispute, that he affirmatively agreed to OpenSea's Terms through the first two flows. *See* Motion to Compel at 4-12; Reply in Support of Motion to Compel (Dkt. 21) at 1-3. For purposes of compelling Plaintiff's claims to arbitration, OpenSea no longer relies on the third flow described above, the Wallet Authentication Flow, referenced in the Motion to Compel (Dkt. 17) at pages 5-6 and explained in the Declaration of Ian L. Meader (Dkt. 17-1) ¶¶ 8-10. For purposes of compelling Plaintiff's claims to arbitration, OpenSea relies only on the first two acceptance flows described above.

Dated: July 5, 2022

Of Counsel:

Eric Ball (admitted *pro hac vice*)
Cal. Bar No. 241327
801 California Street
Mountain View, CA 94041

Molly R. Melcher (admitted *pro hac vice*)
Cal. Bar No. 272950
555 California Street, 12th Floor
San Francisco, CA 94104

Geoffrey R. Miller
Tex. Bar No. 24094847
S.D. Tex. Bar No. 3365078
902 Broadway, Suite 14
New York, NY 10010

Respectfully submitted,

FENWICK & WEST LLP

By: /s/ Rodger R. Cole

Rodger R. Cole (admitted *pro hac vice*)
Cal. Bar No. 178865
801 California Street
Mountain View, CA 94041
Tel.: (650) 988-8500
rcole@fenwick.com

Attorney-in-Charge for Defendant OpenSea

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and served electronically through the Court's ECF System on all parties of interest in compliance with Federal Rule of Civil Procedure 5(b) and Local Rule 5.3 on July 5, 2022.

/s/ Rodger R. Cole
Rodger R. Cole